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Relations between Lawyer and Client in *Damages*: Model, Typical, or Dysfunctional?

Rodney J. Uphoff*

I. INTRODUCTION

Damages is the powerful yet balanced story of a medical malpractice lawsuit brought by Donna and Tony Sabia against Dr. Maryellen Humes and Norwalk Hospital following the birth of their brain-damaged son, Little Tony, on April 1, 1984.¹ The Sabias were represented by Koskoff, Koskoff, and Bieder, one of Connecticut's top personal injury firms. Their case was filed on March 2, 1987, by Michael Koskoff, considered perhaps the best "medmal" lawyer in the state.² Ultimately, Humes settled for \$1.35 million in February 1992,³ while Norwalk Hospital settled for \$6.25 million more than six and a half years after the case was filed.⁴

Not only does *Damages* provide a detailed account of the litigation process in a complex medical malpractice action, but it also offers readers a compelling look at the human toll such a hotly contested case exacts on the plaintiffs, medical professionals, and lawyers involved. In addition, the book recounts numerous lawyer-client interactions and frankly describes how the clients and lawyers felt about each other. Consequently, *Damages* vividly demonstrates how such protracted, emotional litigation is affected by, and ultimately affects, the relationship between lawyer and client.⁵ Indeed, it is the book's focus on lawyer-client relations that makes *Damages* a superb vehicle for exploring the question of whether the establishment of a good lawyer-client relationship is, in fact, critical to good lawyering.

This essay begins, therefore, by briefly examining the question of what constitutes good lawyering. The essay acknowledges the difficulty of defining precisely what is good lawyering. In fact, scholars, judges, and lawyers often dis-

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1. BARRY WERTH, *DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998). Throughout the book, the Sabias' son is referred to as Little Tony and his father as Tony. Little Tony's twin, Michael, was stillborn minutes before Little Tony's birth. For tactical reasons, the Sabias' lawyers decided not to pursue any cause of action on behalf of Michael. *Id.* at 64.

2. *Id.* at 41.

3. *Id.* at 211.

4. *Id.* at 365-66.

5. This is true even though the clients—the Sabias, Dr. Maryellen Humes, and Norwalk Hospital—and their respective lawyers—the members of the Koskoff firm, Bob Monstream, April Haskell, Pat Ryan, Beverly Hunt, and William Doyle—were dramatically different.

agree markedly when they characterize lawyer behavior using the term.⁶ Not surprising, then, even though academic commentators routinely trumpet the importance of establishing a meaningful attorney-client relationship as an important aspect of good lawyering,⁷ not all in the legal profession embrace that view.⁸

Indeed, the debate about the importance of a good lawyer-client relationship largely reflects contrasting attitudes within the legal profession about the client's role in the lawyer-client decision-making process. After briefly discussing the differing orientations toward lawyer-client decision-making, the essay next looks at some of the lawyer-client relationships and a number of the lawyer-client interactions depicted in the book to analyze the extent to which the lawyers portrayed in *Damages* engaged in good lawyering. The essay concludes by highlighting some of the lessons about lawyering revealed by examining the lawyer-client relationships described in the book.

II. WHAT IS GOOD LAWYERING?

In many respects, good lawyering is a concept that defies definition. Unquestionably, the evaluation of some aspect of a lawyer's work—of a closing argument, for example—will necessarily be subjective. Just as judgments about the quality of a movie, of a piano recital, of a particular dive, or of a gymnast's routine reflect the biases and values of the person making the judgment, evaluations of a lawyer's performance will be similarly affected. Nonetheless, even if they

6. Scholars have written volumes about what is demanded of the "good lawyer" and have disagreed sharply as to the proper role of the good lawyer in the American legal system. Much of the debate centers on different critiques of the traditional view of the lawyer as a zealous advocate, who does whatever she can, within the bounds of the law, to promote her clients' interests. See Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 *FORDHAM L. REV.* 1629 (2002). For a recent series of articles continuing that debate, see Colloquium, *What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?*, 70 *FORDHAM L. REV.* 1543-1956 (2002). Similarly, there is widespread, significant disagreement within the legal profession and the academic community about the concept of professionalism. See Peter A. Joy, *What We Talk about When We Talk about Professionalism: A Review of Lawyers' Ideals/Lawyers' Practice: Transformations in the American Legal Profession*, 70 *GEO. J. LEGAL ETHICS* 987 (1994). This essay is not going to join in either debate. Rather, this essay assumes that while good lawyering must be ethically principled, it is not dependant on the adoption of a particular ethical philosophy. See *infra* notes 17-23 and accompanying text.

7. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 66-75, 109-30 (1990); ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 57-60, 113-18 (1999); Robert Bastress, *Client-Centered Counseling and Moral Accountability for Lawyers*, 10 *J. LEGAL PROF.* 97, 99-103 (1985); Gary Goodpaster, *The Human Art of Lawyering: Interviewing and Counseling*, 27 *J. LEGAL EDUC.* 5, 8 (1975).

8. See, e.g., Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *LAW & PSYCHOL. REV.* 97 (2002) (reporting empirical study showing that practicing lawyers underestimate the importance of good lawyer-client relations); Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 *AM. B. FOUND. RES. J.* 253, 261-63 (stating that defense lawyers did not spend time developing a good relationship with their clients because they did not have the time and questioned whether spending the time would affect case outcomes). Indeed, Joseph Allegritti suggests that lawyers "often harbor strongly negative feelings about their clients." Joseph Allegritti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 *CREIGHTON L. REV.* 1, 7 (1993). This resentment of clients leads to relationships marked by manipulation and dominance and not the participatory model touted by academic commentators. *Id.* at 19-23.

cannot define it with any precision, most lawyers and judges know good or bad lawyering when they see it.⁹ Although those same judges and lawyers might disagree on the relative merits of some lawyering, there will often be widespread consensus that a particular argument was brilliant while another was pathetic.

Good lawyering, therefore, involves counsel's skillful, ethical application of his or her legal training in an effort to help solve a client's legal problem. It is not enough that a lawyer perform a particular task competently. To qualify as good lawyering, a lawyer's work must be more than workmanlike, and substantially better than average. Unquestionably, good lawyering requires a high level of competence.

Good lawyering, however, is not defined by the result obtained for the client. A lawyer may give a closing argument that all would agree was marvelous, yet still lose the case. Indeed, an excellent lawyer may prepare a case flawlessly and perform brilliantly throughout a trial and still not achieve a good result for the client. The facts of the case or circumstances beyond counsel's control—the death of a key witness, for example—will often trump good lawyering. Although good lawyering improves the client's chances for success in a case, it surely does not guarantee a successful result.¹⁰

A good lawyer generally strives to give a client a range of creative options to deal with his or her legal problem. Frequently, good lawyering involves fashioning a solution that eliminates or minimizes the client's problem. If litigation is involved, a good lawyer usually works to obtain the best settlement or verdict possible for the client.

Nevertheless, good lawyering cannot ensure that a client's legal problem will, in fact, be resolved to the client's satisfaction. Counsel may work skillfully to generate a host of creative solutions to a client's problem yet find that the client's deteriorating financial situation leaves her unable to take advantage of any of counsel's alternatives. Similarly, despite the lawyer's excellent trial performance, the jury might return a verdict much smaller than anticipated. Even though the client may be very dissatisfied with the result and in turn, with the lawyer's work, that work still might exemplify good lawyering.

Not surprisingly, lawyers considered to be good lawyers by their peers generally engage in good lawyering. Nonetheless, they will not always do so. Lawyers at times simply do not perform commensurate with their general reputation. If an excellent lawyer comes into a negotiation session underprepared and settles the case for much less than she could have gotten with her usual proper preparation,

9. As Gary Bellow observed, "there are not articulated (or enforced) criteria defining competent legal work (beyond recognition of really good or bad work when one sees it)." Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NAT'L LEGAL AID DEFENDERS ASS'N BRIEFCASE 106, 118 (1977), available at <http://www.garybellow.org/garywords/solutions.html> (last visited Apr. 12, 2004). The difficulty in crafting a precise definition of good lawyering is similar to the problem Justice Potter Stewart faced in attempting to define pornography. As Stewart noted, "I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

10. In my experience, I have seen inexperienced, barely competent young lawyers, despite their poor performance, win cases against very good experienced lawyers simply because of the factual strength of their case.

then her work ought not be characterized as good lawyering. Although her performance may have been competent enough to avoid labeling it bad lawyering, her work in that negotiation was not sufficiently skillful such that it merits being called good lawyering.¹¹

On the other hand, a lawyer with a poor reputation may occasionally engage in good lawyering. Such a lawyer might, for example, follow up on a lead and, through her imaginative investigation, locate a key witness who enables her to get a criminal case dismissed. Despite her success, counsel's overall performance may still have been flawed. For example, she may have failed to file an obvious suppression motion or failed to even recognize that she might have been able to obtain the return of her client's property which was unlawfully seized. Nonetheless, her investigative work may well qualify as good lawyering.

Similarly, a young lawyer with no reputation in the legal community, and with few legal skills, may still be capable of good lawyering. Counsel may craft an excellent motion for summary judgment that eloquently presents her client's position. The court and opposing counsel might readily acknowledge her motion and brief as examples of good lawyering. This would be true even though the judge might deny the motion and even if the client later fires the lawyer erroneously believing that counsel's inexperience was to blame for the court's ruling.

This example underscores the reasons why my definition of good lawyering does not take into consideration client satisfaction. First, clients do not always get what they think they deserve. As a result, they may unfairly blame their lawyers and unjustifiably criticize their work even though their lawyers have performed admirably. Take, for example, a client with a minor back injury with a wholly unrealistic expectation of the amount of money he is likely to recover. That client will likely be frustrated by the settlement process and even more aggravated when the jury returns with what the client deems a paltry amount. Such a client may well blame his lawyer for his plight despite counsel's good lawyering, including her valiant efforts to educate the client about the true value of his claim.¹² In such a case, the client's dissatisfaction with his lawyer matters little in assessing the quality of lawyering counsel provided.

Second, clients do not always know what they need, but they may be very satisfied with what they got. A client may come to a lawyer seeking a simple will and be very satisfied with the will drafted, especially when counsel charges only a small fee. Yet, if a competent lawyer had reviewed the client's estate she would have recognized the inadequacy of a simple will and the need for more extensive estate planning. Thus, even though the client may have been quite satisfied with counsel and her work product, her lawyer in drafting this simple will may actually have provided terrible representation.

11. This is so even though the amount obtained may have been higher than some others might have received, as long as it was less than what other properly prepared, skilled lawyers would have obtained under the same circumstances.

12. It may be that counsel failed to spend sufficient time with her client talking about the value of the claim or contributed to the client's unrealistic views by making outlandish statements early in the case about how much the client was likely to recover. If so, then counsel's bad lawyering may, in fact, be to blame, at least in part, for the client's dissatisfaction. See, e.g., Boccaccini et al., *supra* note 8 (discussing a series of studies showing relationship between client dissatisfaction and poor lawyering).

Perhaps surprisingly, incompetent or bad lawyers do at times obtain large verdicts or achieve major successes for their clients. Indeed, this may occur in spite of counsel's mediocre, or even very poor, work.¹³ Although the clients may be thrilled with their lawyers, neither their satisfaction nor the size of the verdict obtained is an accurate measure of the quality of counsel's performance.

Similarly, it is not enough that counsel quickly solves what the client perceives to be his legal problem. Many clients may misdiagnose their own problem or fail to appreciate the scope or the nuances of their situation.¹⁴ Moreover, the client's goals may be based on a faulty understanding of his rights, an ill-defined notion of his best interests, a limited appreciation of the nature of his problem, or a blatant disregard for the rights of others. Consequently, helping the client achieve his stated goals does not necessarily represent good lawyering.¹⁵ Good lawyering, however, generally does involve counseling a client so that he has a better appreciation for his legal predicament and a well-informed understanding of his legal alternatives.¹⁶

Finally, client satisfaction cannot be determinative of good lawyering because a client may at times expect counsel to behave unethically to achieve a favorable outcome. Unquestionably, lawyers cannot provide assistance that is illegal or inconsistent with ethical rules.¹⁷ Yet if counsel is unwilling to do what the client demands, then the client might be very unhappy—even if counsel is doing so be-

13. A terrible golfer might hit a wildly errant shot that bounces off a tree and then rolls a considerable distance on a golf cart path landing close to the green. Even though the result may be spectacular, it was the product of good fortune, not of the bad golfer's ability to make a good shot.

14. See Robert Dinerstein et al., *Legal Interviewing and Counseling: An Introduction*, 10 CLINICAL L. REV. 281, 291-92 (2003); Robert S. Redmount, *The Nature of Client Counseling and the Code of Professional Conduct*, 47 SASK. L. REV. 186, 188-90 (1982-83).

15. See Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 866 (1987); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) [hereinafter Simon, *Lawyer Advice*]. As already noted, scholars disagree vehemently as to whether and under what circumstances lawyers should compromise client goals in order to serve other societal interests. Compare Monroe H. Freedman, *How Lawyers Act in the Interest of Justice*, 70 FORDHAM L. REV. 1717 (2002), and Nancy J. Moore, *In the Interests of Justice: Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775 (2002), and Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, and Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" over Professional Values*, 70 FORDHAM L. REV. 1831 (2002), with DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988), and DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000), and WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) [hereinafter SIMON, PRACTICE], and Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599 (2002).

16. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERING § 20 cmt. c. (2000). Similarly, a good lawyer discusses the client's goals regardless of whether counsel sees herself as a zealous advocate or if she believes she is morally obligated to discuss the broader implications of the client's preferred goals. See Dolovich, *supra* note 6, at 1643.

17. "A lawyer's first professional obligation is to obey the rules of professional ethics of the jurisdiction in which the lawyer is licensed to practice." ABA ANNOTATED MODEL RULES OF PROF'L CONDUCT 585 (4th ed. 1999). See also MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."); *Id.* at R. 8.4(a) (stating that it is professional misconduct to violate or attempt to violate the Rules); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1980) (stating a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

cause of legitimate ethical concerns. Despite the client dissatisfaction it causes, a lawyer generally ought not to be subject to criticism for adhering to the ethical rules of the profession.¹⁸

It is almost inconceivable that a lawyer could violate a clear ethical norm and be deemed to have engaged in good lawyering. Thus, any definition of good lawyering must require that counsel behave in accordance with ethical norms. Admittedly, however, counsel committed to zealously representing her client may find herself having to take action that skirts the line between ethical and unethical conduct. Ethical line drawing can be a perplexing challenge. Indeed, in some instances, scholars vigorously disagree as to where that ethical line should be drawn.¹⁹ The lawyer who finds herself in a vexing ethical dilemma that demands that she take some action, therefore, is likely to be condemned by some and praised by others regardless of how she resolves the dilemma.²⁰ What is critical, however, is that the lawyer has made a conscientious, principled decision to respond to that dilemma and behaved accordingly.²¹

Nonetheless, in some instances, a lawyer who acts zealously on behalf of a client's interests will be in clear contravention of established ethical norms.²² At other times, counsel may act on behalf of her client without ever recognizing or

18. This assumes, of course, that the lawyer is not misapplying or misinterpreting the ethical rules. It may be very bad lawyering for counsel to take certain action or decline to take some action because she erroneously believes such behavior is mandated by the ethical rules. In addition, some scholars do criticize lawyers, even when they adhere to current ethical rules, for promoting their client's interests at the expense of justice or morality. See, e.g., RHODE, *supra* note 15 (arguing that lawyers individually and collectively need to assume greater responsibility for the consequences of their actions); Cramton, *supra* note 15 (criticizing lawyers for following the prevailing ethic of zealous advocacy and urging reforms that modify lawyer hyper-adversarialism). But see Schneyer, *supra* note 15 (taking issue with aspects of Professor Rhode's critique and challenging her "contextual" view of legal ethics).

19. For example, Monroe Freedman and Harry Subin disagree vigorously whether it should be proper for a criminal defense lawyer to seek to discredit a truthful witness through cross-examination. Compare MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 161-71 (1990) (stating that counsel is required to discredit the truthful witness unless doing so hurts the client's case), with Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988) (arguing that defense counsel ought not to be permitted to deceive the jury by knowingly discrediting the truthful witness and that constraining counsel's advocacy will enhance, not undermine, the ends of the criminal justice system).

20. The criminal defense lawyers in *People v. Belge*, 372 N.Y.S.2d 798 (N.Y. Co. Ct. 1975), *aff'd* 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd* 390 N.Y.S.2d 867 (N.Y. 1976) were widely denounced and even criminally prosecuted for failing to disclose the location of several bodies buried by their client. Although the intermediate appellate court affirmed the trial court's dismissal of the indictment, that court noted that the attorney-client privilege is not "all-encompassing" and suggested that the client's interests had to be balanced with "standards of decency" and "the interests of society and its individual members." *Belge*, 376 N.Y.S.2d at 772. Nevertheless, the New York state bar ethics committee ultimately concluded that the lawyers behaved properly and that disclosure would have violated DR 4-101(B). N.Y. St. Bar Ethics Op. 479 (1978). Most commentators share that view. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERING § 60 cmt. b; 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.20 Illustration 9-4 (3d ed. 2003).

21. In other words, as I am using the term, it does not matter if a lawyer sides with Freedman or Subin on the issue of discrediting the truthful witness. As long as a lawyer is acting consistent with an ethically principled position, her skillful application of her legal ability on behalf of her client may be characterized as "good lawyering."

22. See, e.g., Lipin v. Bender, 620 N.Y.S.2d 744 (N.Y. 1994) (involving a lawyer whose client surreptitiously took opposing counsel's work product document off counsel's table, gave it to counsel who, after reading the privileged material, attempted to take advantage of the improperly gained information).

considering the obvious ethical implications of her conduct.²³ In either situation, such conduct ought not to be considered good lawyering even though it produces a good result for the client or is enthusiastically applauded by the client. Simply put, good lawyering must be ethically-sound lawyering.

To be an ethically-sound lawyer, counsel must be able to recognize ethical dilemmas, to analyze them properly, and then make good judgments. A lawyer's life is filled with countless situations in which counsel must make judgment calls. Some decisions are made quickly with minimal reflection and without client input. Counsel decides, for example, not to return opposing counsel's phone call about a potential settlement immediately, but rather opts to wait until the next day. Other decisions—whether to include a specific argument in an appellate brief—may or may not be made in consultation with her client.²⁴

Not surprisingly, good decision-making is a hallmark of good lawyering. As many commentators have recognized, a good lawyer not only makes wise judgment calls herself, but she also skillfully counsels her clients to make good decisions.²⁵ Although all would agree that good lawyering is the product of wise judgment, lawyers often disagree sharply over whose judgment—the lawyer's or client's—should control in a particular situation.²⁶ This disagreement reflects

23. For example, in *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), defense counsel substituted someone else at counsel's table with intent to cause the government's witness to incorrectly identify the person at counsel's table as the defendant. *Id.* at 1336. The witness did so. *Id.* Defense counsel revealed the misidentification at the close of the government's case. *Id.* at 1336-37. The trial judge allowed the government to reopen its case and subsequently found counsel in contempt for using this tactic. *Id.* at 1337. Defense counsel claimed it was a good faith tactic used to test the government's witness and was not prohibited by any court rule. *Id.* at 1338. The court agreed that counsel must represent his client zealously, however, his failure to recognize that his conduct went beyond reasonable limits of advocacy justified his contempt conviction. *Id.*

24. Compare Chief Justice Burger's view of lawyering emphasizing lawyer control of strategic decision-making even without consultation with the defendant in *Wainwright v. Sykes*, 433 U.S. 72, 93-94 (1977) (Burger, C.J., concurring) and *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983) with that of Justice Brennan proposing a more client-centered approach. *Jones*, 463 U.S. at 758-59 (Brennan, J., dissenting).

25. See, e.g., COCHRAN ET AL., *supra* note 7, at 2-9; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 128-34 (1993); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060-89 (1976). For those commentators emphasizing the importance of client autonomy, it is critical to maximize client self-determination and wise decision-making. See, e.g., Bastress, *supra* note 7, at 100-03. On the other hand, there are some scholars who forcefully argue that good lawyers at times are required to be paternalistic. See David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981). For a thoughtful look at the difficulty of distinguishing the refined paternalist view and the autonomy view in practice, see Simon, *Lawyer Advice*, *supra* note 15.

26. For a study documenting the different attitudes of criminal defense lawyers on the questions of whether counsel or the client ultimately should control certain critical decisions, see Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decision-Making between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decision-Making*, 47 U. KAN. L. REV. 1, 27-60 (1998) [hereinafter Uphoff & Wood, *Allocation*]. Model Rule 1.2(a) mandates that, subject to limited exceptions, lawyers shall abide by their clients' choices concerning the objectives of representation. See MODEL RULES OF PROF'L CONDUCT R. 1.2. On the other hand, although counsel should consult with the client as to the means, it generally is the lawyer's responsibility to select the means used to achieve the client's ends. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. As the comment to Rule 1.2 acknowledges, however, a clear distinction between objectives and means sometimes cannot be drawn. *Id.* For a discussion of the limited guidance provided lawyers seeking to resolve the issue of the allocation of decision-making responsibility by ethical rules and case law, see Rodney J. Uphoff, *Who*

very conflicting views about the appropriate role of counsel in representing a client and in markedly different orientations toward lawyer-client decision-making. Invariably, a lawyer's—or a scholar's—view of what constitutes good lawyering is shaped by her decision-making orientation.

III. MODELS OF LAWYERING

In their text, *The Counselor-at-Law: A Collaborative Approach To Client Interviewing and Counseling*, Robert Cochran, John D. Pippa, and Martha Peters identified three models of lawyering: the authoritarian model, the client-centered counseling model, and the collaborative decision-making model.²⁷ Although other commentators have used slightly different terms over the years to describe different models of lawyering,²⁸ the models described by Cochran and his fellow authors are widely recognized. Each model or approach to lawyering reflects a different orientation toward the allocation of lawyer-client decision-making power.

In discussing the authoritarian model—also commonly referred to as the traditional model²⁹—Cochran and his colleagues drew heavily on the work of Douglas Rosenthal. In his often cited empirical study of personal injury lawyers and their clients, Rosenthal found that a majority of lawyers are authoritarian in orientation.³⁰ The authoritarian or traditional view emphasizes lawyer control over the decision-making process. Counsel is responsible for case decisions while the client passively relies on the lawyer's judgment. As Cochran and his fellow authors observed, the authoritarian model assumes that lawyers render effective service; that they make disinterested, objective decisions; that solutions to legal problems are largely technical and generally have a correct solution; and that lawyers as experts have the technical ability needed to determine the correct solution.³¹

The second model identified by Cochran and his colleagues is the client-centered model. David Binder and Susan Price first presented this model in their classic work, *Legal Interviewing and Counseling*.³² The client-centered approach

Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices, 68 U. CINN. L. REV. 763, 772-98 (2000) [hereinafter Uphoff, *Tactical Choices*].

27. COCHRAN ET AL., *supra* note 7, at 2.

28. See, e.g., ROGER S. HAYDOCK ET AL., *LAWYERING: PRACTICE AND PLANNING* 17-20 (1996) (categorizing lawyers along a spectrum with the lawyer as technician on one end, the lawyer as wise counselor at the other, and the lawyer as creator or problem-solver in the middle); JAMES E. MOLITERNO, *ETHICS OF THE LAWYER'S WORK* 129-33 (2d ed. 2003) (referring to the Hired Gun Model, the Expert Model, and the Collaborative Model); John Basten, *Control and the Lawyer-Client Relationship*, 6 J. LEGAL PROF. 7, 16 (1981) (identifying the traditional lawyer-control model, the client-control model, and the co-operative model).

29. The traditional, authoritarian approach maximizes lawyer autonomy by giving counsel broad authority to make the strategic decisions needed to attain the results consistent with the lawyer's view of the client's best interests. For a more extended look at this approach to lawyering, see THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 5-14, 30-39 (1994); Vivian D. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 33-37 (1986); Mark Spiegel, *Lawyering and Client Decision-Making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

30. DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

31. COCHRAN ET AL., *supra* note 7, at 2.

32. See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). Joined by their colleague, Paul Bergman, Binder and Price authored a

seeks to promote client autonomy by making the client an active participant in the decision-making process.³³ The lawyer tries to identify the client's problem from the client's perspective and then enlists the client's aid in identifying potential solutions and the likely consequences of each solution. Ultimately, counsel encourages the client to make all decisions that are likely to have a substantial legal or non-legal impact on the client's case.³⁴ The client-centered model emphasizes client feelings, stresses the importance of lawyer empathy, and insists that lawyers accept client values when rendering advice. Lawyers' recommendations, therefore, shall be designed to promote the client's best interests as defined by that client.³⁵ As Cochran and his compatriots pointed out, "whereas the client has a very limited role in the authoritarian model, the lawyer has a very limited role in the client-centered model."³⁶

The third model discussed by Cochran and his fellow authors is the collaborative decision-making model. Once again, they looked to Douglas Rosenthal who urged lawyers and clients to engage in "mutual participation in a cooperative relationship."³⁷ To Cochran and his colleagues, the collaborative model is superior to the client-centered model because it increases counsel's flexibility, promotes equality, and encourages a lawyer-client dialog about the effects that case decisions may have on others.³⁸ Thus, in Cochran's collaborative model, "the client would control decisions, but the lawyer would structure the process and provide advice in a manner that is likely to yield wise decisions."³⁹

Cochran and his colleagues trumpet the collaborative model because they believe that lawyers following this approach are more likely to achieve what Dean Anthony Kronman calls practical wisdom.⁴⁰ To Kronman, the key to being a good lawyer is the ability to exercise practical wisdom. To exercise such wisdom, a lawyer must "combine the opposing qualities of sympathy and detachment."⁴¹ Acting as a counselor and friend, the good lawyer strives to help her clients make sound judgments. To render the good advice her client needs, counsel must also seek to understand the client. Ultimately, "it is only through a process of joint

revised text, DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 5 (1991), which continues to play an influential role in legal education.

33. This is the approach favored by most legal educators. See Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541, 543 (1995) (observing that the client-centered theory of representation is "accepted and adopted throughout the nation's law schools"). For a sampling of the variations of the client-centered approach, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987).

34. BINDER ET AL., *supra* note 32, at 20-21.

35. *Id.* at 21, 347-59.

36. See COCHRAN ET AL., *supra* note 7, at 5. It should be noted, however, that many commentators espousing a client-centered approach have argued for a greater role for counsel than that originally advocated by Binder and Price. See Dinerstein, *supra* note 33, at 507, 510, 567-70; Dinerstein et al., *supra* note 14, at 302-03; Ellmann, *supra* note 33, at 744-52, 767.

37. ROSENTHAL, *supra* note 30, at 57.

38. See COCHRAN ET AL., *supra* note 7, at 7.

39. *Id.* at 6.

40. See *id.* at 7.

41. See KRONMAN, *supra* note 25, at 304.

deliberations, in which the lawyer imaginatively assumes his client's position, and with sympathetic detachment begins to examine the alternatives for himself, that the necessary understanding can emerge."⁴² Using this process then, the good lawyer is better able to assist her client in making the "deliberatively wise choice" among alternatives.⁴³ Thus, not only does the good lawyer exercise practical wisdom, but she helps her client make wise judgments as well.

Many lawyers tend to have a client-centered or authoritarian orientation, while a few favor a more collaborative approach.⁴⁴ Not all lawyers, however, can be readily identified with a particular style or orientation.⁴⁵ Some lawyers may vary their approach significantly depending upon the client, the nature of the case, or the particular decision at issue.⁴⁶ Thus, lawyers preferring a client-centered approach may not consistently consult with clients with respect to all significant case decisions nor uniformly provide all of their clients equal access to decision-making power. Similarly, a lawyer with a more authoritarian orientation may not necessarily dictate all strategic decisions to every client who insists upon a questionable strategic choice. Research suggests, nonetheless, that lawyers do tend to favor a specific decision-making orientation, and their preferred orientation invariably reflects their view of the extent to which counsel should ultimately control case decision-making.⁴⁷ In turn, a lawyer's decision-making orientation is very likely to affect the manner in which lawyer and client interact and, inevitably, the relationship between them.

42. *Id.* at 133. Other commentators also have advocated a participatory or collaborative approach to lawyering. See MOLITERNO, *supra* note 28, at 129-33; LEONARD R. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 46-49 (abr. 2d ed. 1998); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 *BUFF. L. REV.* 71 (1996); Spiegel, *supra* note 29.

43. KRONMAN, *supra* note 25, at 129.

44. There have been a limited number of studies looking at the extent to which lawyers actually involve their clients in decision-making. Certainly, the most significant study was that done by Douglas Rosenthal of personal injury lawyers and their interactions with their clients. ROSENTHAL, *supra* note 30. Rosenthal's work and the study of public defenders I did with Peter Wood confirm that lawyers have markedly different orientations toward the allocation of decision-making authority. See Uphoff & Wood, *Allocation*, *supra* note 26. In our study of 699 public defenders, Wood and I found that sixty-two percent of the lawyers surveyed generally favored a more authoritarian, lawyer-centered approach, while thirty-eight percent approved of a more client-centered approach. *Id.* at 32-51. For other field studies demonstrating that lawyers can be found favoring each decision-making orientation, see KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 37-67 (1985); HUBERT J. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 163-64 (1963); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 *BUFF. L. REV.* 177 (1986); Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases: Findings from These Studies*, 18 *LAW & HUM. BEHAV.* 437, 450 (1994); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *L. & SOC'Y REV.* 93 (1986).

45. Hurder, *supra* note 42, at 77-80 (arguing that dividing decisions into those that are the client's with the others for the lawyer is not desirable nor does it reflect actual practice).

46. See Basten, *supra* note 28, at 16 (stating that lawyers adopt different approaches depending on nature of their clients, background experiences, and areas of work); Uphoff & Wood, *Allocation*, *supra* note 26, at 38-39 (finding the commitment to a client-centered approach varied significantly depending on the strategic decision at issue).

47. See Uphoff & Wood, *Allocation*, *supra* note 26, at 27-60.

IV. THE IMPORTANCE OF A GOOD LAWYER-CLIENT RELATIONSHIP

Does good lawyering, then, require that counsel establish a meaningful relationship with her client? For lawyers and scholars who prefer a client-centered or collaborative approach, the answer is generally yes.⁴⁸ The good lawyer will concentrate on forging a good relationship with her clients because doing so leads to more effective communication and the discovery of more relevant facts. This, in turn, enhances decision-making and, ultimately, improves the chances of successfully resolving the case. Moreover, the lawyer using either of these two approaches is more likely to obtain the optimal result consistent with the client's best interests because she has taken the time to explore that subject with the client.

To the proponents of the client-centered or collaborative approach, it is not surprising that a good lawyer-client relationship increases client satisfaction. Clients want to be treated with respect. Clients generally appreciate lawyers who care about them and who are attentive to their feelings.⁴⁹ Clients often will respond favorably to lawyers with good relational skills and tend to trust such lawyers. Clients who trust counsel are, in turn, more likely to be satisfied with their case outcomes and more likely to believe they were treated fairly by the legal system.⁵⁰

The lawyer favoring the authoritarian approach might well scoff at the notion that most clients really care about anything other than the bottom line. Indeed, for lawyers with this orientation, the quality of the relationship may be largely irrelevant to the lawyer's primary task of resolving the client's problem as best she can.⁵¹ As a trained and skilled advocate, the lawyer is in the best position to ascertain what clients really need and what course of action to pursue to achieve those needs.⁵² To the proponents of the authoritarian approach, therefore, it is the lawyer viewing the client's situation objectively and dispassionately who should manage the case and make case decisions without interference from emotionally

48. See, e.g., Boccaccini et al., *supra* note 8, at 97-117 (claiming that a good relationship between lawyer and client served the interests of both); Dinerstein, *supra* note 33, at 547-56; Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311, 320 (1981) (reporting that clients valued attorney's interpersonal skills over legal skills); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 337-40, 374-76 (arguing that building a trusting relationship is a prerequisite to effective representation).

49. See, e.g., BASTRESS & HARBAUGH, *supra* note 7, at 130; Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 106 (2001) [hereinafter Boccaccini & Brodsky, *Characteristics*].

50. See Boccaccini et al., *supra* note 8, at 97; Marcus T. Boccaccini & Stanley L. Brodsky, *Attorney-Client Trust among Convicted Criminal Defendants: Preliminary Examination of the Attorney-Client Trust Scales*, 20 BEHAV. SCI. & L. 69 (2002); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 498 (1988); Jean M. Landis & Lynne Goodstein, *When Is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate*, 1987 AM. B. FOUND. RES. J., at 675, 701 (1987).

51. See Dinerstein, *supra* note 33, at 506.

52. See Basten, *supra* note 28, at 17-18. Judicial opinions frequently invoke this argument to justify giving counsel virtually unchecked power over tactical decisions. See, e.g., *Wright v. Estelle*, 572 F.2d 1071, 1073 (5th Cir. 1978) (en banc) (Thornberry, Clark, Roney, Gee, and Hill, J.J., specially concurring) (noting that defense lawyers as "professional artisans" were in the best position to decide trial strategy).

distraught or foolish clients and without spending unnecessary time consulting with their clients.⁵³

Unquestionably, there are some lawyers who, regardless of their attitude toward decision-making, care little about fostering a good relationship with their clients. For example, some unethical lawyers abuse or manipulate clients for their own interests with little or no regard for their clients' interests. Needless to say, such lawyers care little about their relationship with their clients. On the other hand, the ethical lawyer following the traditional, more authoritarian model may well believe that she can effectively serve her clients' best interests without paying any significant attention to the relationship she has with her clients. Much like the brusque doctor who purports to treat the illness, not the patient, such a lawyer may see little need to cultivate a good relationship with her clients.⁵⁴ This is particularly so if devoting time to the relationship detracts from the time she has to attend to investigation, case preparation, or other aspects of the case.⁵⁵

Nor are all clients necessarily interested in a meaningful relationship with their lawyers. Certainly, some clients are only interested in the bottom line.⁵⁶ They want counsel to obtain the best outcome possible and to do so as quickly and as cheaply as feasible. They are not interested in client autonomy but simply want their lawyer to take care of the matter as best she can.⁵⁷ For such clients, the quality of the relationship that they have with their lawyer may well be irrelevant. They have little patience with expensive small talk—especially with a person they view as a legal technician, not as their friend. Accordingly, such clients not only lack any interest in a lawyer's efforts to build rapport, but they may even resent such efforts.

In addition, some clients are not interested in having their lawyers limited to using only ethical means on their behalf. Rather, these clients encourage or even

53. See Allegretti, *supra* note 8, at 19; Basten, *supra* note 28, at 17-18. For an extended discussion of the mixed guidance provided by ethics rules, professional norms, and case law on the question of whether counsel or client ultimately controls strategic decisions, see Uphoff, *Tactical Choices*, *supra* note 26, at 772-98.

54. See Boccaccini et al., *supra* note 8, at 102-17 (reporting that the findings from their study and other studies showed that lawyers neither sufficiently valued good relations with their clients, nor were they willing to spend the time to achieve such a relationship). For a look at the increasing importance that the medical profession places on good relations, see for example, JOHN L. COULEHAN & MARIAN R. BLOCK, *THE MEDICAL INTERVIEW: MASTERING SKILLS FOR CLINICAL PRACTICE* 3-37, 251-60 (4th ed. 2001) (stressing the importance of an empathetic, compassionate approach and good communication skills in order to build a good doctor-patient relationship); WILLIAM R. MILLER & STEPHEN ROLLNICK, *MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE TO CHANGE ADDICTIVE BEHAVIOR* 6-7 (2d ed. 2002) (touting the importance of an empathetic counseling relationship to patient success in therapeutic treatment); Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 CLINICAL L. REV. 391, 393-98 (1998) (describing studies in medical literature suggesting need for doctors to improve ability to counsel in an empathetic manner instead of a cold, detached manner disliked by patients) [hereinafter Smith, *Medical Paradigms*].

55. See Flemming, *supra* note 8, at 261.

56. But see Jill Schachner Chanen, *The Heart of the Matter*, A.B.A. J., Mar. 1995, at 78 (noting that lawyers often mistakenly assume clients are only interested in winning). See also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 761 (1984) (describing that clients' needs and ends must be ascertained because economic ends may not be pre-eminent).

57. As William Simon correctly points out, some clients do not want to make hard decisions, but prefer instead to put their fate in the hands of their lawyer. See Simon, *Lawyer Advice*, *supra* note 15, at 216-18.

expect counsel to get the best results possible regardless of what steps must be taken to obtain those results. Undoubtedly, such clients may care little about establishing a meaningful relationship with counsel.⁵⁸

Nevertheless, most clients want a good relationship with their lawyer.⁵⁹ They want to be able to confide in and to trust the person that they are counting on to help them resolve their problem.⁶⁰ Not only do clients want a lawyer who will listen and respect them, but a legal counselor who cares about them and understands their situation.⁶¹ In short, most clients value lawyers with good interpersonal skills.⁶²

Studies show that lawyers with the ability to relate well with their clients are consistently viewed by those clients as more competent and more likely to help clients achieve their goals.⁶³ Thus, good lawyer-client relations tend to produce satisfied clients. It would seemingly follow then, that lawyers would pay attention to developing good interpersonal skills and a good relationship with their clients.

In the end, many lawyers are likely to claim that they value establishing a good relationship with their clients. But what does it mean to say that a lawyer and a client have a good relationship? Because clients and lawyers do not all value the same things, it is hardly surprising that lawyers and commentators disagree about the elements of a good lawyer-client relationship.⁶⁴ Indeed, what one lawyer or commentator might describe as a good relationship, another might view

58. On the other hand, some clients—for instance a mob boss—may still value highly having a good relationship with their ethically compromised but loyal lawyer.

59. See, e.g., Boccaccini et al., *supra* note 8, at 113-17; Chanen, *supra* note 56. Similarly, most patients want a good relationship with a doctor who is an empathetic, caring professional. See Smith, *Medical Paradigms*, *supra* note 54, at 393-98, 409-30.

60. "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." ABA STANDARD FOR CRIMINAL JUSTICE § 4-3.1, cmt., at 149 (2d ed. 1980). See NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT: SUCCESS THROUGH IMPROVED CLIENT COMMUNICATIONS TECHNIQUES xi (1996) ("Clients are reluctant to cooperate with lawyers who fail to treat them with the respect they deserve.").

61. See Boccaccini & Brodsky, *Characteristics*, *supra* note 49, at 96-101; Alan P. Levine, *Looking for Mr. Goodlawyer: What Clients Want*, A.B.A. J., Sept. 1992, at 60-62.

62. See Boccaccini et al., *supra* note 8, at 113-17; Feldman & Wilson, *supra* note 48.

63. See, e.g., Feldman & Wilson, *supra* note 48, at 320. Moreover, Binder, Bergman, and Price persuasively argue that for most clients "whatever the legal aspects of a problem, non-legal aspects frequently are at the heart of a client's concerns. Effective counseling inevitably requires that you elicit information about those non-legal aspects and factor them into a problem's resolution." BINDER ET AL., *supra* note 32, at 5.

64. For example, John Donnell's vision of an ideal lawyer-client relationship is characterized as:

The ideal counsel-client relationship is based upon the mutual trust of each party as individuals and upon respect for each other as a person competent in his own field. It is a relationship in which neither party seeks to dominate or permits himself to be dominated; yet each is open to influence from the other. It is a personal, helping relationship that goes beyond providing specialized knowledge and offering legal opinions on fact situations defined by the client It is a relationship that can only develop through numerous interactions between counsel and client and, therefore, it must be cultivated over a period of time.

JOHN D. DONNELL, THE CORPORATE COUNSEL: A ROLE STUDY 173-74 (1970). Compare Donnell's vision with that of William Simon who presents an alternative lawyer-client relationship, one that he terms a non-professional relation. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 32-36 (contrasting the "non-professional relation" with the helping or accepting lawyer-client relationship which draws from "existentialist psychotherapy") [hereinafter Simon, *Ideology*].

as dysfunctional.⁶⁵ Thus, just as with good lawyering, it is easier to identify aspects of a good lawyer-client relationship than to craft a precise definition.

For the traditional lawyer with an authoritarian orientation, a good relationship begins with the client trusting that his lawyer will skillfully and zealously deal with the client's legal problem.⁶⁶ Given such trust, the client will truthfully reveal his problem to counsel and then let her pursue the course of action she deems best without any interference. Certainly, counsel will strive to keep her client reasonably informed so that the client can make the limited decisions expected of him. In a good working relationship, however, the client will not place unnecessary demands on the lawyer's time. A client who insists on lengthy explanations or tries to dictate strategy shows a lack of respect for counsel. To the authoritarian, such behavior is inconsistent with a healthy lawyer-client relationship.

The lawyer following a client-centered or collaborative approach has a very different view of a good lawyer-client relationship. Like the traditionalist, she views a trusting relationship between lawyer and client as essential if she is going to be able to provide the client effective representation. If the client does not trust counsel, communication between client and counsel will be impaired.⁶⁷ To the traditionalist, once the client has turned over the problem to counsel, the lack of good communication is not particularly significant. To the client-centered or collaborative lawyer, however, without good communication, counsel is unlikely to understand the client's goals and may fail to learn critical facts needed to enable counsel to achieve these goals. Thus, counsel strives to foster open communication with her client because, by doing so, she is more likely to be an effective interviewer and counselor. Indeed:

[E]ffective legal interviewing and counseling is foundational to effective performance of almost all other lawyer tasks. A lawyer who does not have good interviewing and counseling skills will not be a good advocate. A litigator who is a poor interviewer will miss facts that she should know at trial; a negotiator who is a poor counselor will not know what settlement terms will best meet his client's needs.⁶⁸

In addition, the proponents of the client-centered or collaborative approach agree that a good lawyer-client relationship involves mutual respect and shared expectations.⁶⁹ Open communication ensures that lawyer and client are working

65. Similarly, some people disagree sharply as to what constitutes a desirable marital relationship. Moreover, just as marital relationships evolve over time, there are different kinds and stages of a lawyer-client relationship. Dinerstein, *supra* note 33, at 547.

66. *Id.* at 506. In describing his relationship with his clients, Chesterfield Smith, former ABA President, noted "[C]lients before long get great confidence in me and they don't want me to tell them all of the alternatives. They want me to tell them what to do. I do it and charge them." Panel Discussion, *A Gathering of Legal Scholars to Discuss "Professional Responsibility and the Model Rules of Professional Conduct,"* 35 MIAMI L. REV. 639, 643 (1981).

67. See COCHRAN ET AL., *supra* note 7, at 58; HAYDOCK ET AL., *supra* note 28, at 46-54.

68. COCHRAN ET AL., *supra* note 7, at 2.

69. See *id.* at 25, 35-36, 57-58; Bastress, *supra* note 7, at 99-100. Although frequently critical of the client-centered approach, William Simon also proclaims the importance of mutual respect and acknowledges that "some sharing of ends will be necessary, but this sharing need not approach a complete coincidence of ends." Simon, *Ideology*, *supra* note 64, at 33.

together to obtain the clients' ends. Unlike the traditionalist, these lawyers value client participation despite the added time that a lawyer must spend to make that participation meaningful.⁷⁰ The client-centered lawyer seeks to promote client autonomy.⁷¹ It is, after all, the client's case.

Finally, the collaborative lawyer views good communication as critical because counsel and client share decision-making responsibility.⁷² That does not mean, of course, that client-centered or collaborative lawyers will not have disagreements with their clients over the direction of the case. They surely will. Nonetheless, these lawyers will resolve conflicts with their clients through discussion, and not by the sheer will of counsel.

V. LOOKING AT THE LAWYERING IN *DAMAGES*

It would be reasonable to expect that *Damages* would showcase good lawyering because this book is about a multi-million dollar settlement involving some of Connecticut's top trial lawyers. Undoubtedly, the members of the Koskoff firm, Connecticut's premier law firm representing plaintiffs in medical malpractice cases, were widely regarded as excellent lawyers. Similarly, because of the potential for a huge verdict, the defendants in the *Sabia* case hired some of the state's leading insurance defense lawyers—Bill Doyle, Pat Ryan, and Arnold Bai among others. Given the outstanding reputations of most of the lawyers involved in the case, it also would be reasonable to expect that these lawyers would be superb interviewers and counselors, combining both high levels of legal competence and excellent interpersonal skills. Finally, given the quality of the lawyers involved, it would be reasonable to expect that *Damages* would feature good lawyer-client relationships built on trust. Unfortunately, neither the lawyers, the lawyering, nor the relationships described in the book generally measure up to those expectations.⁷³

70. See Dinerstein, *supra* note 33, at 552-54. Indeed, David Chavkin insists that "most clinicians believe that one cannot be a *skillful* lawyer without embracing the *value* of client-centeredness. The achievement of one or more client goals as an outcome and maximization of the role of the client in the decision-making process are touchstones against which we evaluate responsible and effective lawyer." David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 254 (2003).

71. See Bastress, *supra* note 7, at 100; Dinerstein, *supra* note 33, at 507, 512-17. But see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1998) (criticizing the emphasis that others place on client autonomy) [hereinafter Simon, *Ethical Discretion*].

72. Basten, *supra* note 28, at 23-24.

73. Admittedly, my critique of the lawyers and the lawyering in *Damages* is based on Werth's accounts of the lawyers' behavior and his version of their explanations for their actions. Although Werth is a very accomplished journalist, he may not have fully captured all of the relevant context surrounding some of the events described in *Damages* or related some significant nuance that would clarify why a lawyer acted in a particular instance. I recognize, therefore, that the lawyers in the book may be able to present additional information that would cast them, their conduct, or their relationship with their clients in a much different light. Finally, busy lawyers trying to do their best for a number of clients do not always perform flawlessly. Nor, for that matter, do law professors.

A. Lawyer-Client Communication

From the traditionalist perspective, *Damages* does, for the most part, highlight good lawyers skillfully plying their craft. On the other hand, for those who view lawyering through a client-centered or collaborative lens, *Damages* abounds with examples of poor communication between lawyer and client. In light of their stellar reputations, the lawyers featured in *Damages*, did not display the relational skills one would expect. Perhaps surprisingly, some of the lawyer-client relationships described were actually dysfunctional—only a few relationships appeared healthy. In fact, few of the lawyers portrayed in *Damages* seemed committed to establishing a good relationship with their client. In short, using the criteria discussed by the proponents of client-centered or collaborative lawyering, *Damages* offers far more instances of poor lawyering than examples of good lawyering.

Good attorney-client relationships rarely just happen. As studies and client surveys demonstrate, the development of a trusting, meaningful attorney-client relationship often requires a lawyer to devote considerable time and attention to the relationship.⁷⁴ Yet, not every lawyer will be willing to invest the requisite time to establish or to maintain a quality attorney-client relationship. Additionally, not every lawyer appreciates what he or she must do to forge a quality relationship. Finally, some cases—especially those where there is little at stake or those which will last only a short time—may not warrant the costs involved in forming a good lawyer-client relationship.

Because of the enormous stakes involved and the length of time it generally takes to resolve a medical malpractice action, it would be surprising if the members of the Koskoff firm were not very interested in establishing a good attorney-client relationship with the Sabias. *Damages* leaves readers questioning, however, whether Michael Koskoff was, in fact, committed to establishing such a relationship. Werth traces Koskoff's rise from a radical lawyer "with a heightened sense of justice" for the socially and economically disadvantaged to a wealthy champion of those taking on the medical profession.⁷⁵ Although Michael Koskoff is a brilliant lawyer who is able to communicate effectively with juries, Koskoff did not appear to value establishing a good relationship with the Sabias. Remarkably, as of October 1993, more than six years after the case had been filed, Michael Koskoff still "hardly knew" the Sabias.⁷⁶

To the client-centered or collaborative lawyer, such an admission is almost inconceivable. Good interviewing is absolutely critical to good lawyering. In fact, because of the difficulty of overcoming a negative first impression, good lawyers often try to use the initial client interview to begin the process of building a solid, trusting attorney-client relationship. Commentators promoting the client-centered or collaborative approach argue that gathering information about the client's goals and obtaining a detailed story of the client's problem are essential if counsel is to properly fashion options that address the client's predicament.⁷⁷ It is

74. See COCHRAN ET AL., *supra* note 7, at 114-17; Boccaccini et al., *supra* note 8, at 109; Uphoff, *Tactical Choices*, *supra* note 26, at 802-04.

75. WERTH, *supra* note 1, at 57-63.

76. *Id.* at 260.

77. See, e.g., COCHRAN ET AL., *supra* note 7, at 59-61, 87-88, 95-96; Dinerstein, *supra* note 33, at 547-51.

equally important, however, that counsel take advantage of any opportunities that are presented during that first encounter to establish rapport with the client. For the client-centered or collaborative lawyer, counsel must balance the process of building good rapport with the task of securing the facts needed to render competent representation.⁷⁸

Admittedly, lawyers may have very limited goals in mind when conducting some client meetings. Joel Lichtenstein was the lawyer in the Koskoff firm who screened prospective cases. Thus, when the Sabias first met with Lichtenstein, his focus was solely on deciding whether the Sabias had a case “that appeared at the outset winnable, and valuable enough, for the Koskoffs to take on.”⁷⁹ He spent an hour with them, was non-committal except to say that the firm would look into the matter, and was careful not to “inflamm” them.⁸⁰ Although at that point Lichtenstein was not intent on building any significant rapport, he was interested in being sufficiently empathetic so that the Sabias would want the Koskoff firm to handle their case instead of looking for another firm.

Thus, Lichtenstein had developed “a deft sincerity,” which Werth approvingly described as combining “an undertaker’s solemnity, a psychiatrist’s empathy, a banker’s perspicuity, a doctor’s concern.”⁸¹ The book does not indicate how the Sabias felt about Lichtenstein or his manner. Although they may have felt comfortable with him, they left his office without feeling as if they knew anything more about their prospects than when they arrived. Indeed, Tony described leaving their meeting with Lichtenstein feeling “perplexed.”⁸² Lichtenstein certainly accomplished one of his goals. He definitely had not inflated their hopes or expectations.⁸³

Once Lichtenstein and Koskoff decided to take the case, Lichtenstein notified the Sabias by phone. Somewhat surprisingly, Lichtenstein suggested that his “first job” with the Sabias was “to dampen their hopes that a court case might change their lives.”⁸⁴ It is perhaps even more surprising that at this point Koskoff and Lichtenstein paid so little attention to the formation of their relationship with the Sabias. No one from the firm met with the Sabias to do a more in-depth interview to learn about their backgrounds, to ensure that the firm had the most complete factual picture possible, to explain the litigation process, or to answer their questions. Apparently no one was interested in building rapport with the Sabias or learning about their goals or expectations in bringing this lawsuit.

It is particularly surprising that Karen Koskoff, one of the firm’s young associates and the person assigned to work up the case for the firm, never did an in-depth interview with the Sabias. Had she done so, she may have gained an appreciation for how this tragedy was, in fact, affecting their lives. Unfortunately, Koskoff says it was not until after the Sabias’ depositions that she “realized the

78. COCHRAN ET AL., *supra* note 7, at 57-59.

79. WERTH, *supra* note 1, at 43.

80. *Id.* at 44. By not inflaming them, Lichtenstein meant, “I work very hard to make sure that they never leave the office with a great hatred of the medical process.” *Id.*

81. *Id.* at 43.

82. *Id.* at 45.

83. *Id.* at 44 (noting that Lichtenstein was “careful not to inflate their hopes”).

84. *Id.* at 64. Understandably, Lichtenstein did not want the Sabias to develop unrealistic expectations.

extent of their torment.”⁸⁵ These depositions, however, were held twenty-nine months after the Sabias first met with Joel Lichtenstein.

Another consequence of Koskoff’s failure to do an in-depth interview was that she never learned what the Sabias really were looking for out of this lawsuit. She and the other members of the firm seemingly assumed that the Sabias’ sole motivation was to collect as much money as possible from the defendants.⁸⁶ The Sabias, however, were looking for more than just money. They wanted the defendants not only to acknowledge that they were at fault, but also to formally recognize the suffering they caused the Sabia family.⁸⁷ As Werth observed near the end of the book, for Tony Sabia, “it was the fact that people thought money could solve his and Donna’s and Little Tony’s wounds, that it would buy his acquiescence, that filled him with such contempt.”⁸⁸ Nonetheless, it would be years—and only after serious settlement negotiations had begun—that the Koskoffs actually began to learn about the Sabias’ goals and feelings.

Given the lack of attention that Michael Koskoff paid to rapport building, his relationship with the Sabias can at best be characterized as superficial. To the proponents of the client-centered or collaborative approach, Koskoff’s lack of communication and superficial relationship with his clients was potentially disastrous.⁸⁹ This lack of communication threatened to adversely affect his ability to effectively represent his client. Moreover, his failure to build a trusting relationship created a significant risk of client dissatisfaction that might have jeopardized his ability to settle the case.⁹⁰

Fortunately for the Koskoffs, one of the firm’s lawyers, Chris Bernard, did develop a good relationship with the Sabias. Unquestionably, the Sabias trusted Bernard. They trusted him even more than Michael Koskoff, despite the fact that Koskoff was the firm’s superstar.⁹¹ Bernard gained their trust in part because he was very competent, but primarily because he spent considerable time with each of them, and showed them that “he cared.”⁹² When the Sabias wrestled with the decision whether to settle, it is questionable that a deal would have been struck had it not been for the trust between the Sabias and Bernard. Indeed, it is questionable that the Sabias trusted Michael Koskoff and Joel Lichtenstein enough to have settled the case were it not for Chris Bernard.

Chris Bernard surely was a compassionate man who was sensitive to his clients’ plight and to their feelings.⁹³ For example, he recognized how traumatic it

85. *Id.* at 106.

86. The members of the Koskoff firm are hardly alone in making unwarranted assumptions about a client’s goals. See Simon, *Ideology*, *supra* note 64, at 53-59 (criticizing lawyers for imparting ends to their clients without engaging them in a discussion of their actual ends).

87. WERTH, *supra* note 1, at 311-12, 324-25, 357-61, 365-69. For many plaintiffs, money alone will not remedy the wrong that they have suffered. Like the Sabias, some of the plaintiffs in *A Civil Action* were looking for more than just monetary damages. See JONATHAN HARR, *A CIVIL ACTION*, 452-53 (1995). For an excellent discussion of the powerful role that an apology might play in settling civil lawsuits, see Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. (forthcoming 2003).

88. WERTH, *supra* note 1, at 324.

89. See *supra* notes 48-50, 67-72 and accompanying text.

90. See COCHRAN ET AL., *supra* note 7, at 114-17.

91. WERTH, *supra* note 1, at 357, 366.

92. *Id.* at 366.

93. *Id.* at 297-98.

could be for parents to come to the realization that it was in their financial interest to argue for an extended life expectancy of their disabled child.⁹⁴ Nonetheless, Bernard did not discuss this painful subject with the Sabias or apparently ever urge them to seek counseling to help them cope with their feelings. Bernard did spend considerable time, however, talking with Tony so that he did come to recognize that Tony “wanted more than anything else the vindication of a trial.”⁹⁵ Werth leaves readers with the impression, however, that Bernard was primarily focused on enabling Tony to hold it together so that Tony would present himself as best as possible at trial, rather than helping him heal.⁹⁶

Werth never related any extended conversations between the Sabias and their lawyers about their respective goals, the litigation process, or the handling of this lawsuit. Certainly the Sabias talked to their lawyers, mostly to Chris Bernard, about certain aspects of their lives and of the case. It was not until just before the first mediation session, however, that the Sabias got a clear picture from their lawyers about the case and the potential financial gain involved.⁹⁷ Perhaps even more telling is that it was only during the settlement negotiations that Michael Koskoff learned about the Sabias’ goals, desires, and fears.⁹⁸ Koskoff’s failure up to this point to explore such subjects with his clients is perplexing. To the client-centered or collaborative lawyer, such a failure represents bad lawyering. Many lawyers favoring a traditional approach may well agree with that conclusion. At the very least, this poor communication contributed to the negative feelings and sense of dissatisfaction that the Sabias were left with when the case was concluded.⁹⁹

As the literature on lawyer-client relations illustrates, many variables may affect the formation, development, and nature of the relationship between a lawyer and a particular client.¹⁰⁰ The lawyer’s reputation, status, and standing in a firm; other professional commitments; counsel’s prior professional experiences; the age, sophistication, and intelligence of both parties; the fee arrangement; and the type of case all play a part in defining a lawyer’s relationship with her client. Cultural and gender differences between lawyer and client also may influence the course of their relationship. Additionally, a lawyer’s overall workload may sig-

94. *Id.* at 286.

95. *Id.* at 298.

96. *Id.* Arguably, a lawyer is not responsible for helping clients deal with their pain and loss. Many commentators, however, especially those extolling the virtue of empathy, would agree with me that a good lawyer would attempt to find ways to help the Sabias’ cope with their situation. See, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 44-54 (1994) (arguing for a moral relationship between lawyer and client like that between friends); Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-75 (1992) (emphasizing the importance of empathy and describing his friendship with his clients); Majorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999) (discussing the importance of lawyers’ attending to the emotional aspects of the lawyer-client relationship and stressing the value of empathy). At the very least, Bernard could have recommended some professional counseling. See MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. (“Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.”).

97. WERTH, *supra* note 1, at 310. This meeting occurred on Sept. 29, 1993, seven years after the Sabias first meeting with Joel Litchenstein.

98. *Id.* at 356-69.

99. *Id.* at 324, 365-69.

100. See, e.g., COCHRAN ET AL., *supra* note 7, at 203-21.

nificantly limit counsel's time and ability to promptly respond to a particular client's problems, and thereby undermine counsel's relationship with her client. Invariably, the personalities of the client and lawyer, their general attitudes and philosophic outlooks, as well as their overall life experiences will affect the expectations and attitudes of both parties to a lawyer-client relationship.

It follows, therefore, that a client who has had prior positive or negative experiences with one lawyer is likely to approach a new attorney-client relationship with a different mind-set than a client who has never previously dealt with a lawyer. Similarly, a client's prior experiences with the legal system are likely to affect that client's attitudes toward the system and toward the lawyers with whom the client interacts. Undoubtedly, Humes' prior lawsuit colored her attitude toward the Sabias' lawsuit and adversely affected her relationship with her lawyers.¹⁰¹

Indeed, Humes' relationships with her lawyers varied significantly. Initially, Humes wanted Arnold Bai to represent her. She was fond of Bai and trusted him to look out for her interests.¹⁰² She received a form letter from her malpractice insurer, St. Paul Fire and Marine Insurance Company, however, telling her that her case had been assigned to the firm of Monstream and May.¹⁰³ Bob Monstream, the firm's lead partner, was an experienced lawyer who was committed to providing her a zealous defense.¹⁰⁴ Nonetheless, Humes did not trust him from the onset, believing he was primarily serving St. Paul's interests, not hers.¹⁰⁵

It is fairly easy to understand why injured persons who select a particular lawyer to help them would expect a loyal, empathetic shoulder to lean on and generally be predisposed to trust that lawyer. A client who is assigned a lawyer without any say in the selection process, on the other hand, may have very different expectations. Justice Brennan eloquently wrote of the difficulties faced by appointed counsel in the similar context of defending an indigent criminal defendant observing:

It is no secret that indigent clients often mistrust the lawyers appointed to represent them. There are many reasons for this, some perhaps unavoidable even under perfect conditions—differences in education, disposition, and socio-economic class—and some that should (but may not always) be zealously avoided. A lawyer and his client do not always have the same interests. Even with paying clients, a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee—a common arrangement for criminal defense lawyers—or if his fees for court appointments are lower than he would re-

101. WERTH, *supra* note 1, at 46-49.

102. *Id.* at 74, 166.

103. Most liability policies permit the insurance company to select counsel to defend the case, to supervise counsel's litigation and settlement strategy, and to settle claims within the policy limits at the company's discretion. See Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 265-66 (1995). When the insured requests a defense, he or she impliedly consents to representation by counsel the insurer selects. *Id.* at 282-83. But see ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW § 114 at 599-620 (1987) (arguing that the insured only consents to representation by counsel whose loyalties run exclusively to the insured).

104. WERTH, *supra* note 1, at 76.

105. *Id.* at 75.

ceive for other work, he has an obvious financial incentive to conclude cases on the criminal docket swiftly. Good lawyers undoubtedly recognize these temptations and resist them, and they endeavor to convince their clients that they will. It would be naive, however, to suggest that they always succeed in either task.¹⁰⁶

Thus, it is particularly important for lawyers who have been assigned or appointed to a client to maintain a respectful, open attitude with that client in order to overcome the mistrust that often exists when a client first meets a lawyer he or she did not choose.

Understandably, Humes was mistrustful of any lawyer selected by her insurance carrier because she wanted someone "to represent *her*, not her insurer."¹⁰⁷ Not only had St. Paul selected a lawyer for her without even consulting her, but to make matters worse, the company had referred her case to a firm that was located an hour away from her home. In describing Humes' frustrations and misgivings about her appointed counsel, Werth masterfully captures the sense of vulnerability felt by a defendant in Humes' position.¹⁰⁸

To reduce client mistrust and to minimize the resentment that may be directed toward counsel, appointed defense counsel should afford his or her client an opportunity to discuss any concerns about the counsel's loyalty and zeal. A failure to address and to attempt to allay those concerns is likely to poison the relationship between client and assigned counsel. It is not surprising that a medical professional like Humes, who has simply been assigned counsel by an insurance carrier, may well have had similar concerns about the loyalty of her lawyer. Yet, even though Bob Monstream may have been committed to providing Humes zealous, loyal, representation,¹⁰⁹ it is not clear that he or any of Humes' assigned lawyers were cognizant of, or took any action to alleviate, her concerns.

April Haskell, another partner in the Monstream firm, eventually took over the defense of the *Sabia* case. Although Haskell was sympathetic to Humes' plight, Haskell did little to foster a good relationship with her client. To Humes, Haskell remained "faceless" and the only communication they had was over the phone or through letters.¹¹⁰ Not surprisingly, Humes had no confidence in Has-

106. *Jones v. Barnes*, 463 U.S. 745, 761-62 (1983) (Brennan, J., dissenting). For an article discussing the inherent conflicts of interest confronting an insurance defense lawyer who must try to balance the interests of the insured and the insurer, see Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996).

107. WERTH, *supra* note 1, at 74.

108. *Id.* at 75-76. Given the fact that generally an insurance company retains the right to settle claims within the policy limits without the consent of the insured, insured professionals anxious to fight malpractice claims because of their reputational interests may find themselves at odds with defense counsel looking to limit the company's loss. See Richmond, *supra* note 106, at 509-12. Mistrust between lawyer and client is not limited, however, to just defendants in malpractice and criminal cases. For an excellent study of the interactions between divorce lawyers and their clients and the resulting mistrust that marred many of their relationships, see William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

109. WERTH, *supra* note 1, at 76.

110. *Id.* at 166.

kell. She felt “marginalized” and “failed to find any rapport with her defenders.”¹¹¹

Unquestionably, a lawyer paid by an insurance company to defend a doctor accused of malpractice owes a duty of loyalty to that doctor.¹¹² Commentators and courts disagree, however, as to whether counsel also represents the insurer and owes a duty of loyalty to the company as well.¹¹³ Unfortunately, there is no indication in the book that either Bob Monstream or April Haskell ever had a discussion with Humes about their role, their view of their responsibilities to her, or their obligations to St. Paul. Had either of them done so, perhaps Humes would have been more cooperative and, ultimately, more satisfied with their representation.

Even with a cooperative client, however, the insurance defense lawyer often finds herself in a difficult position. Defense counsel may feel subtle—and at times not so subtle—pressure to also look out for the insurance company’s interests.¹¹⁴ Haskell’s defense of Humes was complicated because a co-defendant hospital was also involved. Haskell found herself not only battling the Koskoffs but worrying that Norwalk Hospital would look to exonerate itself at Humes’ expense.¹¹⁵

Werth offers us considerable insight into the conflicting relationship between insurance defense lawyers and their clients—and with the insurance company that

111. *Id.* at 167.

112. As Silver and Syverud explain, “a debate is raging over the number of clients that defense counsel represents: one (the insured) or two (the company and the insured).” Silver & Syverud, *supra* note 103, at 273. Regardless of which position one takes regarding this debate, counsel clearly owes a duty of loyalty to the insured. It is when the interests of the insured and the interests of the insurer diverge that defense counsel’s difficulties become particularly acute. *Id.* at 340-41 (describing the split of authorities regarding defense counsel’s duties when conflicting interests makes dual representation impossible).

113. The dual client doctrine, or two client, view holds that the insurance defense counsel represents both the insurer and the insured and owes a duty of loyalty to each. See Richmond, *supra* note 106, at 482-83 n.26 (citing cases supporting the dual client doctrine). Compare Stephen L. Pepper, *Applying the Fundamentals of Lawyers’ Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27 (1997-98) (taking the one client position), with Charles Silver, *Does Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994) (taking the dual client view). The *Restatement (Third) of the Law Governing Lawyers* takes the position “that whether only the insured or both insured and insurer (as co-clients) enter into a client-lawyer relationship is a question to be determined on the facts of the particular case.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f. Charles Silver and Kent Syverud argue that the retainer agreement between the insurer and defense counsel should determine whether counsel has one client or two. Silver & Syverud, *supra* note 103, at 274-75. There is no indication in *Damages* that the retainer agreement between the Monstream firm and St. Paul specified whether the firm represented one or two clients.

114. As Doug Richmond observed, “[f]orced to choose between a good, regular client or the insurer, the reasoning goes, insurance defense counsel will necessarily side with the insurer.” Richmond, *supra* note 106, at 483. Or, as Judge Matthes of the Eighth Circuit noted:

Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company.

United States Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978).

115. WERTH, *supra* note 1, at 85. “Liability was often a zero-sum game: how much Humes and the hospital would be held accountable, and might have to pay, depended in large part on how effectively each blamed the other.” *Id.*

retains them.¹¹⁶ Although Haskell kept Humes informed about various aspects of the case,¹¹⁷ she was not consistent in keeping Humes up to date on case developments.¹¹⁸ More troubling, however, was Haskell's failure ever to have a frank discussion with Humes about her conflicted situation. That is, by asking for the policy limits, the Koskoffs "had set Humes and St. Paul irrevocably against each other and that she now was in the middle."¹¹⁹

Haskell's ambivalence about her role reflected her divided loyalties, her uncertain assessment of Humes' chances, and her mixed feelings about her client.¹²⁰ Frustrated with Humes' defensive attitude and worried about how Humes would hold up at trial, Haskell sought to settle, "for Humes' own good."¹²¹ Not surprisingly, Humes reacted negatively to Haskell's push to settle.¹²²

Humes' feelings of frustration, resentment, and powerlessness about her situation and toward Haskell had been mounting.¹²³ As Haskell pressured Humes to agree to settle the case, however, the relationship became more contentious. In describing their deteriorating relationship, Werth observed:

If their relationship could get no worse, it was hard now to see how it could get any better. Humes was at a dead end: she felt Haskell had failed her, and even her old friend Dan Clement seemed to think she was damaged goods. Haskell, for her part, felt saddled with a rogue client. Uncomfortable with Humes' veracity and unable to count on her cooperation, she hoped to settle before the case blew up on her.¹²⁴

The chill in their relationship is, again, hardly surprising. Haskell had been representing Humes for a year and they still had not had a face-to-face meeting.¹²⁵

Humes had paid the Bai firm \$10,000 to monitor the Monstream firm because she did not trust her assigned counsel. Her relationship with the Bai firm soured, however, largely because she felt shunted off to Arnold Bai's associate, Madonna Sacco. Frequently, the manner in which a partner handles the delegation of case responsibility to an associate affects the relationship between the client and each lawyer. An inadequate explanation of that transfer of responsibility may undermine the client's confidence in the firm.¹²⁶ Perhaps Bai did not do an effective job

116. *Id.* at 148-49, 156-58, 182-85. For an extended discussion of the conflicts involved in the tripartite relationship between insurer, insured, and the insurance defense lawyer, see Richmond, *supra* note 106; Silver & Syverud, *supra* note 103.

117. WERTH, *supra* note 1, at 164.

118. *Id.* at 185.

119. *Id.* at 182. See Richmond, *supra* note 106, at 504-09 (acknowledging that an offer to settle for the policy limits creates a conflict between the insured and insurer and puts defense counsel in the middle). In Richmond's view, counsel in this situation "must make the insured aware that a potential conflict of interest exists, and advise the insured to consult independent counsel regarding any excess liability." *Id.* at 506.

120. WERTH, *supra* note 1, at 183, 198-99.

121. *Id.* at 184.

122. *Id.* at 185.

123. *Id.* at 166.

124. *Id.* at 186.

125. *Id.*

126. Moreover, a younger associate may be unwilling or unable to reply directly to a client's inquiries but may feel the need, or be required, to run everything by a senior partner. That may cause communication delays that a client may find increasingly frustrating. Of course, an inexperienced or insensitive

handing off Humes to Sacco. To Humes, talking with Sacco simply was not the same as talking with Bai. Consequently, Humes lacked confidence in Sacco's ability to protect her interests.

Increasingly, Humes felt alienated from those who were supposed to be defending her. Some of her frustration undoubtedly stemmed from Haskell's failure to listen attentively to Humes' concerns. Although Haskell may be a highly competent lawyer, she was not portrayed in the book as a good communicator. She neither appeared to be empathetic nor a careful listener.¹²⁷ Admittedly, Humes at times could be difficult. Sometimes Haskell did strive to listen and to counsel her.¹²⁸ At other times, however, Haskell seemed overly focused on legal aspects of the case such that she "no longer had time for Humes' feelings, or her own."¹²⁹ Certainly, in some measure, the poor relationship between Haskell and Humes can be blamed on Haskell's inability to actually hear or appreciate her client's concerns.

Moreover, Haskell's communication problems were not limited to Humes. Rather, Werth described at length the different versions of the discussion between Bernard and Haskell about Dr. Kurt Benirschke's opinion.¹³⁰ According to Haskell, Bernard told her that all of their experts would say that Little Tony was fine until the labor process and that Humes was liable for his injuries. Haskell inferred that Bernard, in using the word "all," included Benirschke. Bernard, however, claimed he was "absolutely sure" he did not represent what Benirschke would say.¹³¹ Bernard's characterization of this conversation supports the conclusion that Haskell may not have been a good listener.

In contrast to Haskell's inability to effectively communicate with Humes, Haskell was able to communicate well with St. Paul.¹³² Werth described a letter more than seven pages long that she wrote to St. Paul in glowing terms using words such as "skillfully" and "compelling."¹³³ Perhaps Haskell was more comfortable dealing with the representatives of St. Paul than with a defendant doctor. Perhaps, instead, she simply was better at communicating in writing than orally. Some lawyers will, in fact, be more adept at using one medium of communication than others.¹³⁴

lawyer may not recognize a client's growing frustration until it is too late to save a deteriorating relationship.

127. Many commentators have stressed the important role that empathy plays in gaining a client's confidence. See, e.g., Ogletree, *supra* note 96, at 1271-75. Similarly, numerous commentators have emphasized the interplay of good listening and successful lawyering. See, e.g., Gay Gellhorn, *Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321 (1998); Steve Keeva, *Beyond the Words: Understanding What Your Client Is Really Saying Makes for Successful Lawyering*, A.B.A. J., Jan. 1999, at 60.

128. WERTH, *supra* note 1, at 183-84.

129. *Id.* at 187.

130. *Id.* at 187-88. Dr. Kurt Benirschke, the Koskoffs' key expert witness, was described by Werth as "perhaps the world's leading expert on the placentas of twins." *Id.* at 143.

131. *Id.* at 188. This misunderstanding was critical because Benirschke, in fact, blamed the hospital, not Humes, for Little Tony's injuries. Haskell, however, thought Benirschke was "going to tube my doctor." *Id.*

132. *Id.* at 198-201.

133. *Id.* at 199-200.

134. On the positive side, Haskell did strive to keep Humes informed of case developments by copying her on all of her correspondence with St. Paul. *Id.* at 164.

As with most human relationships, good communication between lawyer and client is not a one way street. Thus, even if an attorney is ready, willing, and able to form a good relationship with a new client, the client must be willing to communicate if the relationship is indeed going to flourish. In some instances, a client's attitudes, expectations, or desires will frustrate the development of a healthy attorney-client relationship. *Damages* demonstrates that the Sabias and Humes bear some of the responsibility for the inadequacy of the relationships that they had with their lawyers.

Good communication and a sound relationship between lawyer and client require time and effort. Frequently, even well-intentioned lawyers fail to achieve either goal.¹³⁵ *Damages* highlights numerous examples of poor communication between lawyer and client. Take, for example, Bob Monstream's effort to provide his client, St. Paul, with his assessment of Tony Sabia. His report described Tony as "a tall, thin, nervous-looking gentleman . . . he does not appear as bright as his wife, and would make a fair to good witness on his own behalf."¹³⁶ Yet, Mike Kaufman of St. Paul formed the impression that Tony Sabia was a "drug addict" with "an unsavory past."¹³⁷ Werth did not attribute blame to either Monstream or Kaufman for this miscommunication. Nonetheless, their failure to communicate led to a false impression that unquestionably clouded Kaufman's view of the value of the Sabias' claim and his assessment of the risk that St. Paul faced.¹³⁸

Moreover, some lawyers, even if they are excellent communicators, are never able to forge a good working relationship with a particular client. Werth portrayed Pat Ryan in a very positive light, referring to him as "one of the best medical defense lawyers in Connecticut."¹³⁹ Certainly, Michael Koskoff respected Ryan as a very worthy adversary. Undoubtedly, Norwalk Hospital trusted Ryan. He handled most of Norwalk's malpractice cases. Travelers Insurance Company was involved in the case because, as Norwalk's excess carrier, it was responsible for any claims beyond \$250,000. Yet, despite his superb trial skills and considerable charisma,¹⁴⁰ Ryan was never able to gain Travelers' confidence, primarily because he "had no ongoing relationship with its claim people and little chance of developing one."¹⁴¹ Given the risk of an enormous verdict, Travelers wanted a lawyer it could trust.¹⁴² Travelers decided, therefore, to replace Ryan with Bill Doyle.

Like Ryan, Bill Doyle had an excellent reputation. As outside counsel for Yale University, Doyle was considered by many, including Michael Koskoff, to be the best corporate litigator in Connecticut.¹⁴³ Unlike Ryan, however, Doyle had what Travelers wanted—"his full attention and the comfort that went with it—namely the ability to trust Doyle's counsel because Doyle, not an associate,

135. For an insightful look at the problems even well-intentioned lawyers may encounter as a result of lawyer-client differences, see Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

136. WERTH, *supra* note 1, at 104.

137. *Id.*

138. *Id.*

139. *Id.* at 84.

140. *Id.*

141. *Id.* at 253.

142. *Id.* at 252-56.

143. *Id.* at 256.

was driving the case.”¹⁴⁴ Thus, it was not just Doyle’s legal skills, but his warmth and social adroitness coupled with his ability to deliver that inspired Travelers to have such confidence in him.

Finally, there was one additional factor that buttressed the relationship between Doyle and Travelers—Brian Casey. Casey had worked for Doyle before becoming Travelers’ vice president for medical liability.¹⁴⁵ It was Casey who made the decision to take the case away from Ryan and to offer it to Doyle.¹⁴⁶ He did so because he wanted to be sure that everything possible had been done to limit Travelers’ exposure.¹⁴⁷ In the end, Casey knew he could trust Doyle to tell him whether Travelers could win at trial or whether they should settle.¹⁴⁸

B. Keeping the Client Informed

Most of the time, lawyers who are good interviewers and counselors and who are empathetic, respectful, and non-judgmental, will be able to overcome barriers to communication and establish good attorney-client relationships. That is not, however, the end of the story. A good lawyer-client relationship, like a good marital relationship, must be nurtured or communication problems are likely to develop. Just as it gets harder over time for many people to maintain a healthy marital relationship in the face of hardship and stress, the emotional toll of a lengthy lawsuit strains even the best attorney-client relationship. For lawyers, competing demands on their limited time often make it difficult to keep all of their clients informed of all of the developments—or lack of developments—in their case. In turn, clients may be frustrated with the slow progress of their case such that they run out of patience with counsel or lose interest in their case altogether.

Unquestionably, lawyers are obligated to keep their clients reasonably informed about the status of their case.¹⁴⁹ Model Rule 1.4 requires lawyers to explain matters to the client “to the extent reasonably necessary” so that the client can make informed decisions about the case.¹⁵⁰ This duty of communication does not mandate that counsel promptly advise her client of every action she takes or report on every minor development in the case. Rather, the adequacy of counsel’s communication depends on whether she provided her client all of the material information that might reasonably be expected under the circumstances.¹⁵¹

From the client-centered or collaborative perspective, not all of the lawyers in *Damages* kept their clients adequately informed about the case. Werth described in detail the legal wrangling that went on for months between Bob Monstream and Karen Koskoff. Despite these months of jockeying, Karen Koskoff later admitted she did not advance the case in “any meaningful way.”¹⁵² Although she may not have needed to explain to the Sabias in detail why their case had stalled, she

144. *Id.* Apparently, part of Travelers’ frustration with Ryan was his decision to allow his associate, Beverly Hunt, to depose two of Koskoff’s critical experts instead of deposing them himself. *Id.*

145. *Id.* at 256.

146. *Id.* at 253.

147. *Id.*

148. *Id.* at 252-53, 256-62.

149. MODEL RULES OF PROF’L CONDUCT R. 1.4.

150. *Id.* See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 20.

151. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 20 cmts. b, c, d, e.

152. WERTH, *supra* note 1, at 83.

should have at least alerted them to the fact that procedural maneuvering was bogging down the case. It is unlikely that the Sabias would have been satisfied had they discovered that she did no work on amending their complaint for a year.¹⁵³

Similarly, Bernard contacted many experts looking for those who would help the Koskoffs find a unified theory of liability that would hold both Humes and Norwalk Hospital accountable. Werth never recounted any discussions between the Sabias and any of their lawyers about the selection of experts even though the Sabias ultimately were financially responsible for the cost of all of these experts. Moreover, some of the experts with whom the Koskoffs consulted found Humes' handling of the birth entirely appropriate.¹⁵⁴ Not only were the Sabias entitled to know such information to enable them to make informed decisions regarding the risks of going to trial compared with the merits of any settlement, but it also may have left the Sabias feeling somewhat differently about Humes¹⁵⁵ and about their claim.¹⁵⁶

Bernard kept the Sabias well informed during his negotiations with Marlene Smethurst of St. Paul, as he attempted to settle the claim against Humes.¹⁵⁷ Once again, however, Werth does not relate any significant discussions between Bernard and the Sabias about the likely value of their claim against Humes, the risks associated with continuing to pursue that claim, or the relative benefits of reaching a settlement. Presumably, Bernard was adhering to Michael Koskoff's philosophy of limiting the information a client should be provided. According to Werth, Koskoff "avoided dribbling out information to clients during the long years of a lawsuit" because "[t]hey suffered enough, he thought, without having to endure the 'twists and turns and deviations and high and lows' as their cases staggered through pretrial procedures."¹⁵⁸ Koskoff had counseled them to "[l]ive your lives as if you don't have a suit" and he did so in Werth's words, "both to try to spare them and to dampen their expectations."¹⁵⁹

Thus, it was not until September 29, 1993, six and a half years after their lawsuit was filed, that Michael Koskoff had a lengthy one hour discussion with his clients. At this point:

[The Sabias] still knew little about what had happened to their sons and how the hospital might be at fault. They knew less about the recent developments affecting Koskoff's thinking—Ryan's departure and replacement with Doyle, Judge Ballen's reversals and the trial delays, Little Tony's worrisome life expectancy, the soaring value of comparable cases, the prospects of health-care reform, and the decision to seek mediation.¹⁶⁰

153. *Id.* at 82.

154. *Id.* at 147, 173, 180-81.

155. *Id.* at 210-11.

156. *Id.* at 311-13.

157. *Id.* at 211.

158. *Id.* at 310.

159. *Id.*

160. *Id.*

Understandably, "Tony and Donna struggled to take it all in as Koskoff walked them through the case."¹⁶¹

To the client-centered or collaborative lawyer, Michael Koskoff was expecting far too much of the Sabias. Few clients would have been able to absorb and effectively process so much information in such a short period of time. Most clients need more time to reflect on a decision and a lawyer who springs so much on a client runs a serious risk of overwhelming the client's decision-making capacity. Consequently, Koskoff's withholding of information until the last minute undercut the Sabias' ability to make an informed decision about their case. Not only did Koskoff's approach compromise client autonomy, but it may have increased rather than decreased their overall anxiety.¹⁶² To the client-centered or collaborative theorist, it is a striking example of bad lawyering.¹⁶³

C. Client Participation in Making Case Decisions

Michael Koskoff's attitude toward and method of keeping his clients informed about their case was a factor that undoubtedly affected his relationship with his clients. Indeed, a lawyer's view of his or her role and that lawyer's corresponding style or orientation toward interviewing, counseling, and attorney-client decision-making will invariably shape the kind of relationship counsel has with his or her clients.¹⁶⁴ Unfortunately, Werth's book does not reveal enough about the attitudes of the lawyers involved in this case so that the decision-making philosophy or orientation of each lawyer can be definitively determined.

There is little question, however, that Michael Koskoff and the members of his firm followed the traditional, authoritarian approach to decision-making. Werth provides us a number of examples of significant decisions regarding the case—the decision only to sue on behalf of Little Tony but not his stillborn brother Michael,¹⁶⁵ the selection of experts,¹⁶⁶ the agreement to accede to Doyle's request for a continuance¹⁶⁷—that were made by Michael Koskoff or one of his colleagues with little or no consultation with the Sabias. Moreover, Werth never discussed any conversation between any lawyer in the Koskoff firm and the Sabias about decision-making authority.¹⁶⁸ At no point does Werth hint at anything that would indicate that the Sabias knowingly and intelligently ceded virtually total decision-making power to their lawyers.

To the lawyer adhering to the authoritarian model, of course, there is no need to discuss the allocation of decision-making power because such power clearly resides with counsel. Lawyers with a traditional lawyer-centered view of deci-

161. *Id.* at 311.

162. See ROSENTHAL, *supra* note 30, at 168-69; Dinerstein, *supra* note 33, at 548-49.

163. See, e.g., Chavkin, *supra* note 70, at 254 (stressing the importance of involving the client in the decision-making process as a touchstone of responsible, effective lawyering).

164. See Basten, *supra* note 28, at 16.

165. WERTH, *supra* note 1, at 64.

166. *Id.* at 173-76.

167. *Id.* at 260-63.

168. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. b ("Ideally, clients and lawyers will discuss decision-making authority, making allocations that both understand and approve.").

sion-making do not value client autonomy highly. Rather, clients control only a limited set of decisions and have little to no say in strategic decision-making.

Lawyers adhering to an authoritarian approach, therefore, generally would not allow clients to decide, for example, which witnesses to depose.¹⁶⁹ Indeed, for most lawyers, such a strategic decision clearly rests with counsel.¹⁷⁰ Thus, there is no indication in the book that Karen Koskoff even explained to the Sabias why she made the choice to drop Mollie Fortuna, the labor nurse, as a witness.¹⁷¹ From her perspective, there was no need to do so. Nonetheless, not all lawyers would make an important tactical decision, such as the choice not to depose Fortuna, without discussing that decision with their clients, or perhaps even securing their consent.¹⁷²

Perhaps even more troubling was Michael Koskoff's decision to agree to a continuance requested by Bill Doyle when Doyle first entered the case.¹⁷³ Once again, the Sabias were never consulted about this decision even though they had been waiting for years to get their lawsuit heard. More significantly, Koskoff decided to make this concession even though he felt "a trial sooner rather than later would benefit him and hobble Doyle."¹⁷⁴

Eventually, Koskoff agreed to the continuance, giving Doyle the extra time he needed to prepare. In explaining Koskoff's decision not to push his advantage, Werth noted:

And yet he held back. The case was now between him and Doyle, and the two of them had too much other business together, particularly the Yale case, for Koskoff to want Doyle to feel that he had taken unfair advantage. On the other hand, if he accepted a delay, Doyle would owe him. Whatever he decided, Koskoff knew Doyle would have numerous occasions to repay him, and would, aggressively, when it suited him. In the end, Koskoff agreed to an extension, but not before applying his usual spin. As he would later tell it, Doyle "begged" for a continuance, and he, Koskoff, munificently and at risk to his clients and himself, agreed. Largesse was a Koskoff family trait that hadn't been diluted between Ted's and Michael's generations.¹⁷⁵

169. The comment to Rule 1.2 spells out the traditional ends/means distinction and provides that a lawyer should assume responsibility for technical and legal tactical issues. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2002). For lawyers favoring the authoritarian approach, selecting the witnesses to be deposed is purely a tactical call that is the lawyer's to make. *But see* HAZARD & HODES, *supra* note 20, at § 5.6 (challenging the ends/means distinction and pointing out that the client should both be consulted about and, under certain circumstances, able to control tactical decisions).

170. See Uphoff & Wood, *Allocation*, *supra* note 26, at 47 (reporting that 88.6% of lawyers surveyed believed that lawyers should control the decision whether to call a particular witness at trial).

171. WERTH, *supra* note 1, at 139.

172. This is especially so because Mollie Fortuna, the admitting nurse who failed to alert anyone to the fact that she could not get a second fetal heartbeat, was potentially a very significant witness. *Id.* For an extended discussion of the extent to which counsel should respect the tactical or strategic wishes of a client, including the decision whether to call a particular witness, see Uphoff, *Tactical Choice*, *supra* note 26.

173. WERTH, *supra* note 1, at 262.

174. *Id.*

175. *Id.*

Based on Werth's description of this decision, Koskoff appeared to have traded the Sabias' apparent advantage in order to have Doyle "owe him."¹⁷⁶

To the client-centered or collaborative lawyer, such an important decision should be made by the client, not the lawyer. Admittedly, a lawyer need not consult the client or secure the client's consent every time opposing counsel requests a continuance. This, however, was not an ordinary case, nor merely a routine extension of time. Rather, Koskoff's "largesse" may have ultimately cost the Sabias' dearly.¹⁷⁷ Although a full discussion of this thorny issue is beyond the scope of this article, it is difficult to square Koskoff's behavior with his duty to zealously act on the Sabias' behalf.¹⁷⁸

Even if lawyers and commentators may disagree about the extent to which clients should have a role in strategic and tactical decision-making, lawyers are obligated to inform clients of any settlement offers because the decision to accept or reject a settlement lies with the client.¹⁷⁹ Certainly, from the client-centered or collaborative perspective, it was inappropriate for the Koskoffs to reject Beverly Hunt's request for a settlement meeting without even discussing the matter with the Sabias.¹⁸⁰ Even if the Koskoffs felt that it was premature to discuss settlement without a better grasp of the case, they should have communicated Hunt's overture to the client with, at the very least, an explanation for why the Koskoffs were declining this invitation to talk. It is unlikely that the Sabias would have appreciated learning that the Koskoffs rebuffed Hunt's invitation to talk without even letting them know.

Similarly, when Chris Bernard filed two offers of judgment on March 12 and 13, 1991, neither he nor Michael Koskoff discussed this settlement tool with the Sabias. More startling is that prior to sending these settlement offers, no member of the Koskoff firm had even discussed settlement with the Sabias.¹⁸¹ This is

176. Certainly a lawyer cannot attempt to curry favor with opposing counsel by trading the interests of one client for the prospect of a more favorable result for another client. Doing so runs afoul of Rule 1.7 and 1.2 of the Model Rules of Professional Conduct. See also MODEL CODE OF PROF'L RESPONSIBILITY DR 5-106, DR 7-101(A)(1).

177. As Hazard and Hodes have argued:

[B]oth lawyer and client should maintain a dialog on all but the most technical and mundane of details, and should continually adjust the decision-making process as part of that dialog. The more a decision marks a critical turning point in the representation, whether for tactical, strategic, economic, or even political and moral reasons, the more the lawyer should defer to the client.

HAZARD & HODES, *supra* note 20, at § 5.6.

178. Admittedly, the relevant provisions of both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct provide somewhat conflicting guidance as to the question of whether Michael Koskoff or the Sabias should have had the final say on Doyle's continuation request. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7, EC 7-8, EC 7-9, DR 7-101 (A)(1), D 7-101 (B)(1); MODEL RULES OF PROF'L CONDUCT R. 1.2(a), 1.3, cmt. For a more detailed analysis of the failure of both the Model Code and the Model Rules to provide definitive answers on questions of the proper allocation of decision-making authority, see Dinerstein, *supra* note 33, at 534-38. No matter who ultimately had the right to make this decision, there is no justification for Koskoff's failure to even consult with the Sabias about the decision. Indeed, given Koskoff's overarching duty of loyalty to the Sabias, it was improper for him to give up his client's advantage and jeopardize their case in order to gain future leverage with Doyle.

179. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter.").

180. WERTH, *supra* note 1, at 128.

181. *Id.* at 178.

particularly remarkable since the case had already been pending for more than four years. Once again, to the client-centered or collaborative lawyer, it was bad lawyering for the Koskoffs to have “started the clock on settlement negotiations” without even discussing the matter of settlement with the Sabias.¹⁸²

One might expect that a professional like Humes would be more involved in decision-making than unsophisticated clients such as the Sabias. Unquestionably, Humes desperately wanted to have a say in her own defense—she even hired her own attorney. Nonetheless, she was frustrated because her lawyers failed to actively involve her in the lawsuit filed against her. For instance, April Haskell never gave Humes a clear picture of her consultations with various experts nor did she ever seek Humes’ input into the selection of experts.¹⁸³ Consequently, Humes never felt that she was an active participant in making critical decisions about her case because, in fact, she was not.¹⁸⁴

Neither Haskell nor any of the other lawyers in *Damages* displayed the client-centered or collaborative style of lawyering. Rather, the lawyers depicted in *Damages* generally followed a traditional, authoritarian approach. Consistent with this view of lawyering, the lawyers in the book—most prominently, Koskoff and Haskell—seemed comfortable in manipulating their clients to help those clients secure what counsel deemed to be best for the client. Although their clients ostensibly made the decisions to settle, Koskoff and Haskell, in fact, made the calls.

VI. CONCLUSION

In the end, *Damages* highlights some important lessons about lawyering. First, good lawyers do not necessarily adhere to a particular lawyering style.¹⁸⁵ Michael Koskoff, one of Connecticut’s premier lawyers, is presented in the book as a traditional, authoritarian lawyer. Virtually all of his peers, and the lay public as well, would surely agree that Koskoff is an excellent lawyer. From the client-centered or collaborative perspective, however, Michael Koskoff’s approach to lawyering runs contrary to the principals critical to good lawyering.¹⁸⁶ I would agree. In my view, the authoritarian manner in which Michael Koskoff dealt with his clients unnecessarily threatened the success of the Sabias’ lawsuit, compromised client autonomy, and ultimately exacerbated the Sabias’ suffering. Nonetheless, Koskoff was able to overcome his failings and obtain a good result for the

182. *Id.* The comment to Model Rule 1.4 stresses the importance of keeping the client adequately informed about settlement offers, communications from the other side and general strategy so as to enable clients to be able to intelligently make a decision about serious settlement offers. MODEL RULES OF PROF’L CONDUCT R. 1.4. For those commentators promoting an even more participatory role for the client, the Koskoff’s lack of communication with the Sabias is even more troubling. See, e.g., Hurder, *supra* note 42, at 74-99.

183. WERTH, *supra* note 1, at 148-49.

184. *Id.* at 166-67.

185. I share Bob Dinerstein’s observations that being a client-centered lawyer does not ensure that counsel will develop a good relationship with her client or that she will handle a client’s case competently. Conversely, an authoritarian lawyer might develop excellent rapport with a client and render terrific service while at the same time dominating all decision-making. Dinerstein, *supra* note 33, at n.248.

186. See Chavkin, *supra* note 70, at 254.

Sabias. In the end, therefore, even critics of the authoritarian style would concede, as I do, that overall, Koskoff served his clients well.

Damages also demonstrates, however, that even good lawyers make mistakes and do not always act wisely. As the book reveals, the litigation process involves a stressful series of judgment calls often made in the face of conflicting pressures and without adequate information. Inevitably, mistakes happen. Like other professionals, good lawyers have bad moments, bad days, and bad cases. One of the attributes of a good lawyer is the ability to recover adeptly from an error or lapse in judgment. Nonetheless, sometimes even a good lawyer makes a poor judgment call that costs a client dearly.

Haskell's failure to depose Dr. Benirschke before settling Humes' case based on a misunderstanding of Benirschke's position certainly adversely affected her client.¹⁸⁷ Similarly, Karen Koskoff's failure to depose Mollie Fortuna, the labor nurse, kept her from learning about Fortuna's potentially helpful testimony.¹⁸⁸ If the case had proceeded to trial against the hospital, the decision not to depose Fortuna might have come back to haunt the Koskoffs. A more critical mistake was Bill Doyle's decision not to probe further at Dr. Benirschke's deposition.¹⁸⁹ Had he done so, Doyle might have discovered that the Koskoffs' star witness believed his client, Norwalk Hospital, was not at fault. It is unlikely that Doyle would have settled for as much as he did had he known Benirschke's ultimate conclusion.

Despite their outstanding reputations, it is debatable, then, that any of the lawyers in *Damages* truly displayed the practical wisdom touted by Dean Kronman—except perhaps Bill Doyle. Although Doyle stood to have made a lot more economically if the case went to trial instead of settling, he and Casey settled the case. Admittedly, he settled for more than he thought the case was worth.¹⁹⁰ He did so, however, because he had forced Koskoff down \$15 million from his initial settlement figure and he realistically feared a trial verdict of \$20 million. Travelers ultimately agreed to the settlement because it trusted Doyle's assessment of the risk involved of losing at trial. It was Casey's confidence in Doyle's judgment that led to the final settlement.¹⁹¹ It is likely that Casey would agree that he and Travelers reaped the benefits of Doyle's practical wisdom.

On the other hand, Doyle failed to uncover the fact that Dr. Benirschke, Koskoff's key expert, would have testified that there was nothing the hospital could have done to have saved the twins.¹⁹² Indeed, Benirschke called Norwalk's decision to settle a "gross misjustice."¹⁹³ Thus, in hindsight, Travelers might question the wisdom of Doyle's judgment. Unlike the readers of this book, however, trial lawyers like Doyle must make tough judgment calls on imperfect information without the benefit of hindsight.

187. WERTH, *supra* note 1, at 187-88, 209-12.

188. *Id.* at 139.

189. *Id.* at 308-09.

190. *Id.* at 365.

191. *Id.* at 367-70.

192. *Id.* at 309.

193. *Id.* at 374.

Undoubtedly, Koskoff believes he did as well for the Sabias as any lawyer could have.¹⁹⁴ Although he finally recognized during the final settlement negotiations that the Sabias were driven by more than money, Koskoff felt that by pushing them to settle, "he had saved them from something much worse: yet another crushing disappointment followed by the wait for a trial that still might not happen."¹⁹⁵ Yet the Sabias' conflicted feelings about the settlement were in part a product of Koskoff's lawyering style. He kept the Sabias uninformed and uninvolved throughout the process, overwhelmed them with information, and then rushed them to a decision without adequate time for reflection.

Believing he knew what was best for his clients, Koskoff manipulated the Sabias so that when it came time to make a settlement decision they ultimately would follow his advice. For example, when Koskoff called the Sabias and asked them to come to his office and discuss the settlement he had already agreed to, he did not even tell them why he wanted to meet with them. As Tony remarked, "[T]he only reason I went up is because I thought it was about the trial."¹⁹⁶ Not surprising, the Sabias were "bewildered. It was all happening too fast."¹⁹⁷ Koskoff's paternalism may well have worked to the Sabias' advantage. Settling may have been best for the Sabias. That decision, however, was not the product of "joint deliberations"¹⁹⁸ or of the Sabias' "deliberatively wise choice."¹⁹⁹

Just as Koskoff failed to exercise practical wisdom, Haskell floundered as she attempted to represent Humes. Although Pat Ryan concluded that Haskell had represented Humes "as well as anyone could have under the circumstances,"²⁰⁰ Haskell herself was not so sure. Rather, she concluded that she was frustrated that she could not find a way to defend Humes and settled only because it was the best Haskell could do for her. Despite the fact that she found Humes a very difficult client, Haskell claimed "in my heart of hearts, I was sympathetic."²⁰¹ Given her frustrations with her lawyers and with her situation, it is inconceivable that Humes would agree that Haskell treated her as a friend or gave her the benefit of her practical wisdom.²⁰² To Humes, Haskell kept her at arms length, never demonstrating that she cared or that she was listening to her concerns.

Finally, *Damages* teaches us that it is important for a lawyer to have a frank conversation with her prospective client about the nature of the relationship they are about to form. Indeed, to the client-centered or collaborative lawyer, it is imperative that counsel and client have a conversation about the client's expectations and the lawyer's decision-making orientation before the client decides whether to retain counsel.²⁰³ Such a conversation will alert the parties to each other's attitudes and may keep them from entering into a frustrating relationship that will end badly. Even for the authoritarian lawyer, the benefits of an early conversation

194. *Id.* at 369.

195. *Id.*

196. *Id.* at 365.

197. *Id.*

198. KRONMAN, *supra* note 25, at 133.

199. *Id.* at 129.

200. WERTH, *supra* note 1, at 209.

201. *Id.* at 210.

202. Nor would Humes agree that Bob Monstream gave her sympathetic, sage advice. *See id.* at 164-68, 183-88.

203. *See* Hurder, *supra* note 42, at 88-96.

about decision-making are substantial. Given the absence of any such conversations between the lawyers and clients in the *Sabia* case, it is hardly a surprise that the lawyer-client relationships, for the most part, faltered. In the end, *Damages* shows us that even the most successful lawyers may have considerable room for improvement in how they relate to their clients.